COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. .....

MARIA REY,

Petitioner,

vs.

PENN SHIPPING CO., INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SUBJECT INDEX

	PAGE
OPINIONS BELOW	1
~~OPINIONS BELOW~~	~~2~~
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT	2
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	10

TABLE OF AUTHORITIES

Cases:

The Atlanta, 82 Fed. 235, 1948 A. M. C. at page 1796	4
Calmar S. S. Corp. v. Taylor, 303 U. S. 525	7
Cheng v. Ellerman Lines, Ltd., 1926 A. M. C. 1038	5
Farrell v. U. S. A., 1949 A. M. C. 613	4, 6, 7
Hanrahan v. Pacific Transport Company, 262 Fed. (2) 951	5
Harden v. Gordon, 11 Fed. Cas. 480, 6047	4, 7
Hegsted v. Standard Transportation Co., 1934 A. M. C. 150	5
Methodist Episcopal Hospital v. Pacific Transport Co. (N. D. of Cal., 1920), 3 Fed. (2) 508	2, 3, 4, 5

STATUTES

Laws of Oleron, 30 Fed. Cas. 1174	8
Robinson, Admiralty, page 300	7
28 U. S. C. A. 1254 (1)	2

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Maria Rey, citizen of the United States, resident of the City of Newark, New Jersey, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, decided on the 29th of April, 1960, and entered in the United States District Court, Southern District of New York, on May 17, 1959.

Opinions Below

The opinion of the United States District Court, Southern District of New York (Cashin, D. J., R. 16a-17a), is reported at 277 Fed. 2d 905. (See Applt.'s App., pp. 17-18.)

The opinion of the Court of Appeals is not yet published in Fed. 2d. (See Applt.'s App., pp. 23-26.)

The decision of the Circuit Court of Appeals, Second Circuit, was handed down on April 29, 1960, entered in the United States District Court, Southern District of New York, on May 17, 1960; no petition was filed for a rehearing.

Jurisdiction

The jurisdiction of this Court is founded in 28 U. S. C. A. 1254 (1), but proceeds on the ground that this is a case of admiralty and maritime jurisdiction in which a libel *in personam* was duly and properly filed in the United States District Court, Southern District of New York, against respondent, Penn Shipping Co. Inc., owner and operator of a vessel on which a seaman, Andres Galban, was seriously hurt, and the claim is to recover the cost of his board and lodging while he was a patient of physicians who were treating him for injuries sustained on the vessel of respondent.

Questions Presented

The rule established in the United States District Court, Northern District of California, in *Methodist Episcopal Hospital* v. *Pacific Transport Co.*, 3 F. 2d 508 (D. C., N. D. Cal., 1920), which has been followed by the United States District Court of Georgia is the law in this case, and the decision of the United States District Court, Southern District of New York, in the case at Bar, as affirmed by the Court of Appeals, Second Circuit, is not the law in this case.

Statement

Maria Rey, citizen of the United States, housewife, residing at 67 Columbia Street, Newark, New Jersey, knowing

the seaman, Andres Galban, and having reliable information that he had been injured in rough weather at sea on the Penn Explorer, a Liberian flag vessel operated by an American Company on or about the first of April, 1958, while obeying an order to secure a 450-pound drum of lubricating oil which had become loose and was floating or rolling around the after well deck; and knowing his physicians and having inquired from his attorney about the pendence of an action at law in the Municipal Court of the City of New York, First District, gave credit to said Andres Galban for room and board between May 24, 1958, and November 30, 1958, to the extent of $702.

While said action for damages by the seaman, Galban, was still pending and undetermined (as it still is on appeal) petitioner Maria Rey, filed a libel in admiralty *in personam* in the United States District Court, Southern District of New York, against Penn Shipping Co. Inc. to recover the sum that she had expended in giving room and meals to the injured seaman, Galban, during a period of convalescence while he was attending physicians known to her in New Jersey, which period of unemployment and outpatient treatment began she claims May 25, 1958, the day he left the hospital, and ended the 30th of November, 1958, when medical treatment ceased.

The proctor for respondent made a motion to dismiss this libel of libellant, the petitioner herein, Maria Rey, on the 11th of June, 1959. This motion was argued before Judge John M. Cashin, and on the 13th of August, 1959, the Court made a memorandum decision from which we quote:

> "Libellant insists that she has a claim for maintenance and cure due to Galban. Libellant relies on Methodist Episcopal Hospital v. Pacific Transport Co., 3 F. 2d 508 (D. C. N. D. Cal. 1920). In that case the libellant was in a hospital which had treated a seaman injured on board respondent's vessel. The Court allowed recovery in that case, stating that it could see

little difference if maintenance and cure were paid to the injured seaman or to the hospital. This court does not concur in that opinion" (see appellant's appendix, p. 18).

The Libelant, the petitioner herein, filed stipulation for costs and filed the necessary record in accordance with the rules of the court. The case came on for argument before the United States Court of Appeals for the Second Circuit on April 4, 1960, Docket No. 25,998. The decision of the Circuit Court of Appeals, Second Circuit, in affirming the order of Judge Cashin, was unanimous (Chief Judge Lumbard, Circuit Judges Hincks and Friendly), opinion by Judge Friendly. In that decision, although the learned Court refers to the decision of Mr. Justice Story in *Harden* v. *Gordon*, 11 Fed. Cas. 480, 483 (No. 6047) (C. C. D. Me. 1823), the Court does not mention the language of the decision of this Court in *Farrell* v. *United States*, 1948 A. M. C. 613, 336 U. S. 511.

It further appears from the statement made to the Court of Appeals and the record, that petitioner, Maria Rey, had inquired from Andres Galban's lawyer as to the status of his case for damages and maintenance and cure, and was informed that an offer of settlement had been made.

Reasons for Granting the Writ

I. The decision of the Court of Appeals, Second Circuit, is in direct conflict with the decision in the case of *Methodist Episcopal Hospital* v. *Pacific Transport* (N. D. of California, 1920), reported 3 Fed. (2) 508, which had been approved by the United States District Court of Georgia in the *Atlanta*, 82 Fed. 235, 1948 A. M. C. at page 1796.*

---

* At that time prior to passage of the Jones Act it was believed that the failure to erect metal stanchions to protect seamen from slipping overboard would not render the vessel unseaworthy.

This case was not followed by the United States District Court, Eastern District of New York in *Cheng* v. *Ellerman Lines, Ltd.*, 1926 A. M. C. 1038, nor in *Hegsted* v. *Standard Transportation Co.*, 1934 A. M. C. 190.

(a) The decision in *Methodist Episcopal Hospital, supra,* written by Judge Maurice T. Dooling, of the Northern District of California on December 30, 1920, decided that the libel filed by the Methodist Episcopal Hospital to reimburse the hospital for expenses of treating a seaman named William F. Hanrahan, whose claim for damages had been defeated by a decision of the Court of Appeals, Second Circuit, on November 12, 1919, should not be dismissed. *Hanrahan* v. *Pacific Transport Company*, 262 Fed. (2) 951.**

In his decision, Judge Dooling said:

> "The rule that the shipowner is bound for the expense of maintenance and cure of an injured seaman is one established for the benefit of the latter, and, if the owner fails to furnish maintenance and medical treatment, the real benefit to the seaman may be lost through his inability to secure such maintenance and treatment upon his own credit.
>
> "(2, 3) It would be a defense to this action, if maintainable at all, to show that the amount claimed had already been paid to the seaman. I see no reason why it would not equally be a defense to an action by the seaman to show that the amount had been paid to the hospital. In either event the amount due, whether due to the seaman or the libelant, is so due because libelant furnished the seaman care and treatment which should have been furnished by respondent, and whether paid to the seaman or directly to libelant should ultimately reach the latter. As I have said, the

** This summary of reasons is submitted also as petitioner's brief or argument.

question presented is a new one, but I am inclined to the belief that the action may be maintained. The subject matter of the action is clearly maritime; and the action is not barred by laches."

(b) In the case of *Farrell* v. *U. S. A.*, 1949 A. M. C. 613, your petitioner's proctor again tried in vain to convince this Court that maintenance and cure for life should be given to a member of a merchant vessel injured in the course of a voyage during war time. The court divided, five to four, thus sustaining the decision of the Court of Appeals. The decision of the Court—five judges—was written by Mr. Justice Jackson. Dissent by Mr. Justice Douglas with whom Mr. Justice Black, Justice Murphy and Justice Rutledge concurred. From Mr. Justice Jackson, majority opinion, we quote:

(P. 618):

"The law of the sea is in a peculiar sense an international law, but application of its specific rules depends upon acceptance by the United States. The problem of the sick or injured seaman has concerned every maritime country and, in 1936, the General Conference of the International Labor Organization at Geneva submitted a draft convention of the United States and other states. It was ratified by the Senate and was proclaimed by the President as effective for the United States on October 29, 1938. 1939 A. M. C. 1591, 54 Stat. 1693. Article 4, paragraph 1 thereof provides: 'The shipowner shall be liable to defray the expense of medical care and maintenance until the sick or injured person has been cured, or until the sickness or incapacity has been declared of a permanent character.'

"While enactment of this general rule by Congress would seem controlling, it is not amiss to point out that the limitation thus imposed was in accordance with

the understanding of those familiar with the laws of the sea and sympathetic with the seaman's problems.

"The Department of Labor issued a summary of the Convention containing the following on this subject: 'The shipowner is required to furnish medical care and maintenance, including board and lodging, until the disabled person has been cured or the disability has been declared permanent'." *Robinson, Admiralty*, page 300.

In *Farrell* v. *U. S. A.*, *supra*, Vinson, C. J. and Reed, Frankfurter, Jackson, Burton, concurred; Douglas, Black, Murphy and Rutledge dissented.

(c) In the dissenting opinion, reference is made to the important cases on maintenance and cure--*Harden* v. *Gordon*, Fed. Cas. 6047; *Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525, and Judge Douglas, at page 623, said:

"Maintenance and cure is an ancient doctrine. It reflects in part the concern which the state has had from an early date in a poor and improvident class of workers. See Mr. Justice Story in *Harden* v. *Gordon*, Fed. Cas. No. 6,047. It also recognizes the imperative necessity of the nation to maintain in peace and war a merchant marine. If men are to go down to the sea in ships and face the perils of the ocean, those who employ them must be solicitous of their welfare. Maintenance and cure is an inducement on the part of masters and owners to be solicitous of the health, safety, and welfare of seamen while they are in the service. It gives a degree of security though injury or sickness be incurred. It gives service in the merchant marine a dignity equal to the important function it performs. It reflects 'the great public policy of preserving this important class of citizens for the commercial service and maritime defence of the nation'." Id.

II. We respectfully suggest that the obligation of shipowners to pay maintenance and cure has been well known to people connected with the marine industry for centuries. At this time there are thousands of seamen, citizens of South American republics and European countries who find employment on foreign flag vessels like this one, American owned and a flag of Liberia, who are not permitted to stay ashore any longer than twenty-nine days. They are at a disadvantage in trying to organize in such a way as to improve their earnings by collective bargaining. If injured or sick they are often neglected. The owners of these run-a-way vessels, who are no doubt operating their ships under foreign flags in order to avoid payment of United States income taxes, offer small and inadequate sums to injured seamen and, of course, as in this instance, deny that they are responsible for the amount expended by a citizen like the libelant, Maria Rey, to feed and care for the injured mariner.

Laws of Oleron, 30 Fed. Cas. 1174, reads as follows:

"ART. VII.

"If it happens that sickness *seizes* on any one of the mariners, while in the service of the ship, the master ought to set him ashore, to provide lodging and candlelight for him, and also to spare him one of the shipboys, or hire a woman to attend him, and likewise to afford him such diet as is usual in the ship; that is to say, so much as he had on shipboard in his health, and nothing more unless it please the master to allow it him; and if he will have better diet, the master shall not be bound to provide it for him, unless it be at the mariner's own cost and charges; and if the vessel be ready for her departure, she ought not to stay for the said sick party—but if he recover, he ought to

have his full wages, deducting only such charges as the master has been at for him. And if he dies, his wife or next of kin shall have it."

According to one Pet. Adm. Append. iii, this justly celebrated code was originally promulgated by Eleanor, Duchess Guienne, the mother of Richard I of England. On returning from the Holy Land, she enacted these laws at Oleron. The language in which this collection of laws was originally clothed is that of Gascony. At any rate Richard I of England inherited the dukedom of Guienne from his mother. The ordinances were adopted by Louis XIV of France and admitted as authority in the courts of common law, as well as in the courts of admiralty of England.

The effective use by the disabled seaman of his right to maintenance and cure is a critical problem facing a society dependent upon a strong merchant marine for its lifelines. In the era of the atomic ship the master no longer lands one of the ship-boys to care for the disabled seaman. The injured seaman is forced to depend upon credit to procure his necessities. Without credit he will not have lodging and food. He becomes the easy victim of immorality or suicide. Unless the hospital, doctor or even the relative has a legal remedy for restitution, an atmosphere for credit is not created. The humanitarian and economic grounds upon which the right is based are thus defeated.

Because petitioner is poor she claims she cannot afford to append the opinion of the Court of Appeals to this petition, but she submits a certified copy of appellant's appendix to which it is attached.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari may be allowed and issued directly to the United States Circuit Court of Appeals commanding that Court to certify and to send to this Court a full and complete transcript of the record of all proceedings of said court in the above entitled cause, to the end that said cause may be reviewed and determined by this Court as provided by law.

Dated, New York, N. Y., July 25, 1960.

Respectfully submitted,

SILAS BLAKE AXTELL,
Proctor for Petitioner.

M. VINSON HAYES,
Of Counsel.

COPY

IN THE

Supreme Court of the United States

October Term, 1960

No. 41

MARIA REY,

Petitioner,

vs.

PENN SHIPPING CO., INC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI AND APPENDIX

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Statement	2
ARGUMENT:	
I.—Under the facts of this case, the interpretation of the law by the Court below was correct	3
II.—The shipowner's duty to provide maintenance to a seaman while receiving treatment of a curative nature is not a guarantee of his board bills	5
III.—The right to maintenance is one that rests exclusively with the seaman and cannot be asserted by anyone who purportedly acts in reliance thereon and furnishes services to a seaman	6
CONCLUSION	7
APPENDIX Opinion of the District Court	1a

CASES CITED

Aetna Life Insurance Co. v. Middleport, (1887) 124 U. S. 534 3

Calmar S. S. Corporation v. Taylor, 303 U. S. 525 5

PAGE

Chen v. Ellerman Lines, Ltd., 1926 A. M. C. 1038 .. 4

Cohen v. Superior Oil Corporation, 90 F. 2d 810, 811-812 4

Cortes v. Baltimore Insular Line, Inc., 287 U. S. 367, 371-372 6

Deposit Bank v. Frankfort, 191 U. S. 499, 520 4

De Zon v. American President Lines, 318 U. S. 660, 667 6

Emery v. United States, 27 F. 2nd, 992 4

Farrell v. United States, 336 U. S. 511 5

Harden v. Gorden, 11 Fed. Cas. 480, No. 6047 5

Hegsted v. Standard Transportation Co., 1934 A. M. C. 190 4

Methodist Episcopal Hospital v. Pacific Transport Co., 3 F. 2nd, 508 ..... 3, 4

Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721, 749 6

Robins Dry Dock & Repair Co. v. Flint, 275 U. S. 303, 307 6

Trafford Hall, 1926 A. M. C. 1038 3

AUTHORITY CITED

4 Williston, Contracts, Sec. 1211 (Rev. Ed., 1936) .. 7

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PENN SHIPPING CO., INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI

Opinions Below

The opinion of the District Court is unreported but a copy thereof is set forth in the appendix annexed hereto. The opinion of the United States Court of Appeals for the Second Circuit is officially reported in 277 F. 2d 905.

Jurisdiction

It is not disputed that there is jurisdiction under Title 28 U. S. C., Section 1254 (1). However the petition fails to establish that there exists any of the grounds for granting the writ set forth in Rule 19 of the Revised Rules of this Court.

Statement

This litigation concerns an attempt by a boarding house keeper to recover from a shipowner a board bill which a seaman had incurred but had not paid while living in her establishment. This board bill was incurred after the debtor seaman had been hospitalized for a condition which it was claimed was incurred or manifested itself during the debtor's seaman's service aboard a vessel owned by the respondent.

Prior to the subject action, however, the debtor seaman had instituted an independent action in his own right, in the Municipal Court of the City of New York, for the purpose of recovering damages on account of injuries which he claimed he sustained while employed aboard respondent's vessel. That action was then duly tried. On December 4, 1958, the Trial Court sitting, as the trier of the facts, rendered a decision dismissing the claim for damages and holding that the debtor seaman was entitled to maintenance only for the period from May 24, 1958 to June 30, 1958 in the amount of $228.00 (Certified Record, pp. 12, 15).

Thereafter on May 1, 1959 (Certified Record, p. 1), or almost six months later, petitioner commenced this action. Under the guise of a purported reliance on the duty of a shipowner to provide a sick or injured seaman with needed medical care and maintenance, petitioner seeks the value of the board and lodging which she claims she furnished to the debtor seaman during the period from May 25, 1958 to November 30, 1958, despite the fact that in the action which the seaman brought in his own right, there has been an adjudication that the shipowner's duty to provide maintenance ceased as of June 30, 1958 and an award has been made to the debtor seaman covering his maintenance for the period from May 24, 1958 to June 30, 1958.

The debtor seaman has appealed from the decision in the action which he brought in his own right and that appeal is pending.

The District Court dismissed the petitioner's action on the ground that it was insufficient in law. It held that the petitioner had no claim for the board and lodging against the respondent but that her claim lay against the debtor seaman.

On the authority of this Court's decision in *Aetna Life Insurance Co.* v. *Middleport* (1887), 124 U. S. 534, and the decision of the District Court in *Trafford Hall* (E. D., N. Y. 1926), 1926 A. M. C. 1038 (not otherwise reported), it rejected the decision of the District Court in *Methodist Episcopal Hospital* v. *Pacific Transport Co.* (D. C., N. D., Cal., 1920), 3 F. 2nd 508, on which petitioner seeks to base this petition and held that the theory of subrogation had no application where petitioner, under no obligation to do so, voluntarily extended credit to the debtor seaman.

The Court of Appeals affirmed the judgment of the District Court (Certified Record, pp. 23-26).

ARGUMENT

I

Under the facts of this case, the interpretation of the law by the Court below was correct.

There are no issues in this case which warrant review by this Court on certiorari. Petitioner's contention that the decision of the Court of Appeals is in conflict with an old District Court decision affords no valid basis for certiorari. That decision was subsequently rejected by two District Courts. *Chen* v. *Ellerman Lines, Ltd.* (E. D.,

N. Y., 1926), 1926 A. M. C. 1038; *Hegsted* v. *Standard Transportation Co.* (1934), 1934 A. M. C. 190 (not otherwise officially reported), and, as the Court of Appeals pointed out, finds no basis either in precedent or law to sustain it.

In any event, the decision in *Methodist Episcopal Hospital* v. *Pacific Transport*, 3 F. 2nd 508, does not authorize a volunteer, who is under no obligation to provide services to a seaman, to collect for those services under the guise of enforcing a right which belongs exclusively to a seaman, and which properly figures in the seaman's own recovery. The judgment which the debtor seaman recovered in the action which he commenced in the Municipal Court of the City of New York, though on appeal, is res judicata. *Emery* v. *United States* (D. C., Pa., 1928), 27 F. 2nd 992; *Cohen* v. *Superior Oil Corporation* (3 Cir., 1937), 90 F. 2d 810, 811-812. It is final until reversed in an Appellate Court, or modified or set aside in the Court of its rendition *Deposit Bank* v. *Frankfort* (1903), 191 U. S. 499, 520. In fact under the facts of this case the very contention in support of which *Methodist Episcopal Hospital* v. *Pacific Transport*, 3 F. 2d 508, is offered by petitioner was rejected by the Court in that case. At page 508 the Court said:

> "It would be a defense to this action, if maintainable at all, to show that the assessment claimed had already been paid to the seaman * * *."

Thus since the right on the basis of which petitioner seeks to base her claim has been asserted by the debtor seaman against respondent and the question of whether or not he is entitled to enforce that right and the extent to which he can enforce it, will be determined in that action, petitioner's libel is insufficient in law and therefore was properly dismissed.

II

The shipowner's duty to provide maintenance to a seaman while receiving treatment of a curative nature is not a guarantee of his board bills.

This Court's decisions in *Farrell* v. *United States* (1948), 336 U. S. 511, and *Calmar S. S. Corporation* v. *Taylor* (1937), 303 U. S. 525, and Mr. Justice Story's opinion in *Harden* v. *Gordon*, 11 Fed. Cas. 480, No. 6047, as well as the Laws of Oleron, 30 Fed. Cas. 1174, afford no basis for converting a shipowner's duty to provide a seaman with maintenance, which duty applies only during the time the seaman is receiving treatment of a curative nature, *Farrell* v. *United States* (1948), 336 U. S. 511, into a guarantee of his bills for board and lodging no matter how and when incurred.

A Court of competent jurisdiction has found after trial in which the issues were sharply contested that the debtor seaman was not entitled to any maintenance other than for the period from May 24th, 1958 to June 30, 1958. Petitioner, on the other hand, asserts a claim for board and lodging covering the period from May 25, 1958 to November 30, 1958. The period of time embraced in petitioner's claim thus seeks recovery not only for the same period for which the debtor seaman obtained recovery, but for a period of time for which respondent has been held not liable under the law. The decisions referred to by petitioner sanction no recovery even by the seaman himself. The petition is, therefore, completely devoid of any merit as there is no basis in law on which the libel can be supported initially.

III

The right to maintenance is one that rests exclusively with the seaman and cannot be asserted by anyone who purportedly acts in reliance thereon and furnishes services to a seaman.

The right to maintenance and cure is one that is annexed to the employment relationship between the ship and the seaman without heed to any expression of the will of the parties. Since no agreement is competent to abrogate this right, *Cortes* v. *Baltimore Insular Line, Inc.* (1932), 287 U. S. 367, 371-372; *De Zon* v. *American President Lines* (1942), 318 U. S. 660, 667, no one other than a seaman possesses the right to enforce it. It exists solely for the benefit of the seaman and, as the Court of Appeals properly pointed out, petitioner's claim cannot be sustained either under the theory of creditor beneficiary, quasi contract or subrogation. To recover as a creditor beneficiary it is not enough that the right sought to be enforced may operate to petitioner's benefit. It must also appear that the parties intended to recognize the petitioner as the primary party in interest and as privy to the promise. *Pennsylvania Steel Co.* v. *New York City Ry. Co.* (2 Cir. 1912), 198 Fed. 721, 749; *Robins Dry Dock & Repair Co.* v. *Flint* (1927), 275 U. S. 303, 307.

There is no basis for a quasi contractual recovery because respondent will not be unjustly enriched since respondent remains liable to the debtor seaman for all expenses of board and lodging as imposed by law.

Nor is there any basis for a claim by petitioner by way of subrogation. Petitioner was in no way bound to dis-

charge the shipowner's liability to the debtor seaman. 4 Williston, Contracts, Sec. 1211 (Rev. Ed., 1936).

Accordingly petitioner's libel is utterly without foundation and was properly dismissed.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully Submitted,

VICTOR S. CICHANOWICZ
Counsel for Respondent.

APPENDIX

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MARIA REY,

Plaintiff,

AGAINST

PENN SHIPPING CO., INC.,

Defendant.

MEMORANDUM

CASHIN, D.J.:

This is an action in admiralty for maintenance and cure by Maria Rey who extended credit for room and meals to Andres Galban. Respondent, Penn Shipping Co. Inc., upon whose vessel Galban was injured, has moved for "judgment on the pleadings" on three grounds:

"(1) This claim is not within the admiralty jurisdiction of this court.

"(2) That the libellant is estopped from alleging the claim in her libel as necessary parts thereof have been previously adjudicated.

"(3) That the claim does not state any basis for recovery by the libellant against the respondent."

The motion will be treated as an exception to the libel.

Galban sued respondent in the Municipal Court of the City of New York and was awarded $228 for maintenance and cure (24) for the period from May 24, 1958, to June 30, 1958, by Judge McCarthy on December 4, 1958. Galban has appealed this decision and this appeal is still pending

Libellant insists that she has a claim for maintenance and cure due to Galban. Libellant relies on *Methodist Episcopal Hospital* v. *Pacific Transport Co.*, 3 F. 2d 308 (D. C., N. D., Cal., 1929). In that case the libellant was a hospital which had treated a seaman injured on board respondent's vessel. The Court allowed recovery in that case, stating that it could see little difference if maintenance and cure were paid to the injured seaman or to the hospital. This court does not concur in that opinion.

Libellant has no claim against respondent but rather has a claim against the injured seaman. The theory of subrogation has no application in this case where libellant, under no obligation to do so, voluntarily extended credit to Galban. *Aetna Life Insurance Co.* v. *Middleport*, 124 U. S. 534 (1888); *Trafford Bell*, 1926 A. M. C. 1168 (E. D., N. Y., 1926).

In *Heasted, Adm.* v. *Standard Transportation Company*, 1934 A. M. C. 190 (S. D., N. Y., 1934), libellant tried to recover, in his individual capacity, money advanced for his deceased son's board, lodging, medical attendance and cure during the time deceased was under treatment after being injured on respondent's vessel. The court refused to follow *Methodist* v. *Pacific*, *supra*, stating that,

> "subrogation has no application to a mere gratuitous voluntary payment by one under no obligation to respond."

The court went on to find that the deceased administratrix could recover, in his representative capacity, for the maintenance and cure claim of the decedent which did not abate at his death.

Accordingly, the libel is insufficient in law, respondent's exception is sustained, and the libel is dismissed.

It is so ordered.

Dated, New York, N. Y., August 13th, 1959.

John M. Cashin
U. S. District Judge